Supreme Court, U.S.
FILED
AUG - 1 2000
CLERK

(3)

No. 99-2053

IN THE

Supreme Court of the United States

DAVID HERN,

Petitioner,

v.

INTERMEDICS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

LEE BURDICK
Counsel of Record
WILLIAM K. SANDERS
PRIMA LEGAL SERVICES
Attorneys for Petitioner
2317 Broadway, Suite 350
Redwood City, CA 94063
(650) 261-0500

161294

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

11/99

TABLE OF CONTENTS

	Page
Table Of Cited Authorities	ii
Summary Of Argument	1
Reasons For Granting The Writ	3
I. The Court Of Appeals Decision Conflicts With Decisions Of The Supreme Court, Other Circuits, And The Ninth Circuit Regarding When A New Trial On All Issues Is Required.	3
II. The Court Of Appeals Decision Conflicts With Decisions Of Other Circuits, And Decisions In The Ninth Circuit, Regarding When A Civil Verdict Should Be Reversed For Attorney Misconduct.	6
Conclusion	8

TABLE OF CITED AUTHORITIES

Page

Cases:

Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931) 2, 4

Greenleaf v. Garlock, Inc., 174 F.3d 352 (3d Cir. 1999) 6, 7

Kehr v. Smith, Barney, Harris, Upham & Co., 736 F.2d 1283 (9th Cir. 1984) 6

Morrison Knudsen Corp. v. Fireman's Fund Insurance Co., 175 F.3d 1221 (10th Cir. 1999) .. 5

Pappas v. Middle Earth Condominium Assoc., 963 F.2d 534 (2d Cir. 1992) 7

Trejo v. Denver & Rio Grande Western Railroad Co., 568 F.2d 181 (10th Cir. 1977) 5

Rules:

Ninth Circuit Rule 36-3(b)(2)(ii) 1

Ninth Circuit Rule 36-3(b)(2)(iii) 1

Sup. Ct. R. 10 2

United States Constitution:

Seventh Amendment 1, 4

SUMMARY OF ARGUMENT

Petitioner David Hern[1] hereby replies to the opposition to his petition for certiorari. The petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit, which in an unpublished decision dated February 3, 2000, reversed on very limited grounds and few factual findings all issues of liability and damages decided in a jury verdict.[2]

While Respondent's opposition is riddled with misstatements of facts and law, it completely misleads the Court with respect to the precedential nature of the Ninth Circuit's unpublished decision. Respondent argues that the petition presents no "precedential conflict," because the Ninth Circuit's unpublished decision cannot be cited as precedent. Under a rule change effective July 1, 2000, unpublished decisions in the Ninth Circuit may "be cited for purposes beyond law of the case, res judicata or collateral estoppel," even though they are not "binding precedent."[3] Consequently, Respondent's suggestion that this case does not warrant the Court's review, because it is unpublished, ignores the reality: The Ninth Circuit's decision makes bad law, which can be repeated both within the circuit and beyond if it is allowed to stand.

The reasons the Ninth Circuit's decision below makes bad law were fully discussed in the petition for writ of certiorari. First, the Ninth Circuit failed to properly apply the Seventh Amendment to the U.S. Constitution, as well as long-standing

---

1. To show just how far removed from the facts and the law of this case it is, Respondent incorrectly refers to Petitioner as *Michael* Hern. Opposition ("Opp.") at 1.

2. Respondent repeatedly emphasizes that the decision on review was penned by the Honorable Ellsworth A. Van Graafeiland, a Senior Circuit Judge visiting from the Second Circuit, in a transparent effort to avoid any association between the court's decision and the Ninth Circuit. Opp. at 1, 4. However, the opinion does not attribute authorship to any one of the panel members who heard the case. App. A at 2a.

3. Ninth Circuit Rule 36-3(b)(2)(ii), (iii) (amended July 1, 2000).

Supreme Court precedent, when it ordered an entire new trial on liability and damages, though Respondent did not challenge the jury's verdict in its entirety. *See Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). Respondent argues that the Ninth Circuit's ruling was proper, because the issue of Respondent's liability is "inextricably intertwined" with the allocation of fault between Respondent and Petitioner's physicians, who were not parties to this case. Opp. at 5-6. This argument directly contradicts the position Respondent took before the district court and the Ninth Circuit, and amply demonstrates that the Ninth Circuit failed to give due consideration to the issue of a properly limited retrial.

Second, the Ninth Circuit applied a different standard from other circuits (as well as the decisions of other panels in the Ninth Circuit) in reversing the award of punitive damages on the issue of attorney misconduct. Opp. at 4. Respondent somewhat comically argues that, because the results of the cases cited were the same, the decisions among the circuits were consistent. That argument, however, is logically flawed on its face; the mere fact that two courts reached a similar conclusion in different cases does not mean that there is no conflict between those courts and among the circuits regarding the proper standard to be applied where a party seeks to reverse a jury verdict because of alleged attorney misconduct.[4]

---

4. Respondent incorrectly argues that Petitioner "agrees that the trial was tainted by judicial error and attorney misconduct." Opp. at 1, 7. A more bogus statement of Petitioner's case could not be made. Petitioner vigorously argued before the Ninth Circuit that there was *no* error during the trial, that counsel's statements in final closing argument do *not* rise to the level of misconduct under the law, and that the judgment should be affirmed in its entirety. *See* App. A. Indeed, Petitioner continued to argue before the Ninth Circuit on its petition for rehearing that there was no error below or attorney misconduct. Petitioner has not repeated those arguments in his Petition simply because they do not present the kinds of concerns which this Court deems appropriate for review on a writ of certiorari. *See* Sup. Ct. R. 10.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS OF THE SUPREME COURT, OTHER CIRCUITS, AND THE NINTH CIRCUIT REGARDING WHEN A NEW TRIAL ON ALL ISSUES IS REQUIRED.

In its opposition to the petition, Respondent does not challenge Petitioner's statement that, on appeal below, Respondent did *not* seek a reversal of the entire judgment in the Ninth Circuit, nor did it ever argue before the Ninth Circuit that reversal of the entire verdict was necessary or required. Petition ("Pet.") at 4. Yet, Respondent now argues that the issue of its liability for strict product liability, negligence, and breach of warranty, as well as whether it acted with malice and oppression, are "inextricably intertwined" with the issue of whether some comparative fault should be allocated to Petitioner's physicians, who are not parties to this action. Opp. at 5-6. However, Respondent fails to explain how the issue of whether Petitioner's physicians were contributorily negligent for failing to notify him that his pacemaker was potentially defective can be "inextricably intertwined" with the jury's findings that:

- The pacemaker had a manufacturing defect;
- Petitioner was injured when the pacemaker failed;
- Petitioner's injuries resulted in damages of a certain amount, regardless of whose fault caused them;
- Respondent breached its warranty to Petitioner; and . . .
- Respondent acted with malice and oppression.

App. D.

Respondent further argues that it was appropriate for the Ninth Circuit to have "concluded . . . that justice demanded a retrial of all issues," without citing to the decision. Opp. at 5-6. Nowhere in the panel decision does the Ninth Circuit suggest that it considered — much less made findings on — the issue of whether the physician's alleged comparative fault was so "inextricably intertwined" with Respondent's as to warrant a complete retrial of liability and damages. Nor were any findings made that "justice demanded a retrial of all issues." In fact, the Seventh Amendment to the U.S. Constitution suggests that justice requires a limited retrial under circumstances like these, where only a few separate and distinct jury findings are challenged on appeal. *Gasoline Products*, 283 U.S. at 500.

Instead, through the use of loose language and a disregard of the record before it, the Ninth Circuit appears to order such a retrial. App. A at 15a. Indeed, any doubt that the Ninth Circuit failed to consider the propriety of a limited retrial is overwhelmed by its ruling that a retrial on the issue of "damages" is required, because of the prejudicial misconduct of counsel. App. A at 15a. However, *the purported misconduct occurred during the closing argument in the second phase of the trial, when the only issue to be decided was the amount of Petitioner's punitive damages*; Petitioner's compensatory damage award had been made two weeks earlier. App. D; App. F at 54a-55a.

Respondent further argues that a retrial of all issues "will not take any more time than a partial retrial." Opp. at 5. That patently self-serving argument completely ignores the record in this case, and is irrelevant to the issues that warrant a grant of certiorari.[5]

---

5. Contrary to Respondent's assertion, a retrial on all issues will take significantly more time — to say nothing of the costs to both the court and the parties — than a limited retrial. At trial, Petitioner introduced several expert witnesses to prove that his pacemaker was defective, that he was injured when his pacemaker failed, and that (Cont'd)

Whether the issues to be retried are so intertwined with the other issues in the case as to require a full retrial is only one question the Ninth Circuit should have considered before reversing the entire verdict. *See, e.g., Morrison Knudsen Corp. v. Fireman's Fund Insurance Co.*, 175 F.3d 1221, 1255 (10th Cir. 1999). Consistent with other circuits, the Ninth Circuit should have considered whether the error calls into question the jury's prior finding on liability. *Id.* Where the parties have had a full and fair trial on certain issues, the court of appeals has a duty to protect the prevailing party's interest in the finality of that judgment. *Trejo v. Denver & Rio Grande Western Railroad Co.*, 568 F.2d 181, 185 (10th Cir. 1977).[6]

This case presents the Court with an opportunity to consider whether it is appropriate for a court of appeals to order a retrial of an entire case where, as here, the appellant did not appeal from certain aspects of the verdict; never argued on appeal that full retrial is necessary; and the jury's special verdict provided adequate detailed findings that would allow the court to determine which issues need not be retried. This case also provides a vehicle whereby the Court can consider whether this Court's precedent, and the interests of finality of judgments and judicial economy, require the courts of appeal to address the issue of a limited retrial in situations similar to those presented in this case. Petitioner submits that this is an important issue that should be considered by the Court in these times when expanding dockets are burdening the federal judiciary.

(Cont'd)
Respondent acted with malice and oppression. *None of this evidence will be required in a limited retrial on the issues of apportionment or on the amount of punitive damages.* In any event, Respondent has not cited a single case in which a court has held this to be a relevant consideration in determining whether to grant a full or partial retrial.

6. Respondent contends that Petitioner is attempting to "take advantage of significant parts of the judgment that resulted from the error-ridden trial." Opp. at 1, 7. To the contrary, Petitioner has a right to finality of those aspects of the judgment which were not affected by error and which Respondent did not challenge on appeal.

II.

THE COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS, AND DECISIONS IN THE NINTH CIRCUIT, REGARDING WHEN A CIVIL VERDICT SHOULD BE REVERSED FOR ATTORNEY MISCONDUCT.

Respondent does not directly challenge Petitioner's contention that there is a conflict among the circuits regarding an issue that has never been addressed by this Court: When should a jury verdict in a civil case be reversed because of the misconduct of counsel? While the Ninth Circuit in this case held that the verdict should be reversed because the court was convinced that the jury was "influenced" by counsel's statements (App. A at 11a), other circuits (as well as other panels in the Ninth Circuit) have required a showing that the jury's award of damages was excessive in light of the evidence, *i.e.*, the verdict itself must show that the jury was actually prejudiced by the alleged misconduct. Pet. at 12.

Indeed, Respondent attempts to argue that, because the *result* in *Greenleaf v. Garlock, Inc.*, 174 F.3d 352 (3d Cir. 1999) was the same as the *result* in *Kehr v. Smith, Barney, Harris, Upham & Co.*, 736 F.2d 1283 (9th Cir. 1984), there is no conflict among the circuits warranting this Court's review. Opp. at 7.[7]

---

7. To support its argument, Respondent referred to Petitioner's statement that the court in *Greenleaf* "reached a different conclusion" from the court in *Kehr*. Opp. at 7. By that statement, Petitioner was suggesting that the *Greenleaf* court's conclusion as to what was the appropriate standard to apply to attorney misconduct in a civil trial differed from the *Kehr* court's conclusion as to the appropriate standard, a statement which is true. Pet. at 14-15. The statement was not intended to refer to the court's ultimate finding that the district court did not abuse its discretion in denying a new trial on the ground of attorney misconduct. The outcome of a particular case is of little interest to this Court on petition for a writ of certiorari; inconsistent application of the law to the facts in various cases among the circuits is, however.

However, Respondent's focus on the result rather than on the reasoning of those cases, as well as its failure to discuss *Pappas v. Middle Earth Condominium Assoc.*, 963 F.2d 534, 540 (2d Cir. 1992), ignore the reality that there *is* a conflict among the circuits. In *Greenleaf*, the court adopted the standard that a new trial may be granted where it is reasonably probable that improper statements influenced jury. 174 F.2d at 363-64. Likewise, in *Pappas*, the court held that a new trial should be granted where remarks during closing argument unfairly influenced the verdict. 963 F.2d at 540. The holdings in *Greenleaf* and *Pappas* are consistent with the Ninth Circuit's decision in this case, and they clearly conflict with the holdings in other circuits as well as with the Ninth Circuit's holdings in a multitude of other cases. *See* Pet. at 14-15, 17-18. In each of those cases, the courts held that attorney misconduct does not warrant a reversal where the alleged conduct did not result in actual prejudice to the jury and the jury did not award excessive damages.[8]

The integrity of the judicial system is compromised when there is uncertainty as to the standard the courts will apply to reverse a verdict on the ground of attorney misconduct. The conflict among the circuits on this important issue cries for some direction from this Court.

---

8. Petitioner did not argue, as Respondent suggested, that the Ninth Circuit has held that misconduct during closing argument can never be sufficient to warrant reversal. Opp. at 6. Instead, Petitioner argued that, prior to this case, the Ninth Circuit has consistently held that a court must find the misconduct *directly affected* the award of damages. Pet. at 17-18. Petitioner did show, however, that in 15 prior cases (five published and 10 unpublished decisions), the Ninth Circuit never once reversed a district court's finding that statements made during closing argument did not rise to the level of prejudicial misconduct. Pet. at 17-18, n.9 and App. I. Thus, the court's use of a different standard in this case directly affected the outcome of the appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LEE BURDICK
Counsel of Record
WILLIAM K. SANDERS
PRIMA LEGAL SERVICES
Attorneys for Petitioner
2317 Broadway, Suite 350
Redwood City, CA 94063
(650) 261-0500